United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

77

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,641

FRANK LEWIS,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Whether it was error to allow the wife of appellant to testify.

2. Whether the delay between the time the indictment was returned and the date of trial prejudiced appellant.

3. Whether appellant was denied due process of law because there was no preliminary hearing.

4. Whether the showing of photographs to complaining witnesses for identification purposes comported with due process.

(The pending case was not previously before this Court.)

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No. 22, 641

FRANK LEWIS,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia from a judgment of conviction following a trial before a judge and jury on a charge of robbery and assault with a dangerous weapon, violation of Title 22, Sections 2901 and 502, D. C. Code. Jurisdiction in this

Court is based upon Title 28, Section 1291, U. S. Code.

STATEMENT OF CASE

Appellant was charged, together with Charles Clary, in a two count indictment returned in the District Court on October 9, 1967. In the first count appellant was charged with robbery in violation of Title 22, Section 2901 D. C. Code, and in the second count he was charged with assault with a dangerous weapon in violation of Title 22, Section 502 D. C. Code. Appellant was tried on September 26 and 30, 1968 before a jury. On October 1, 1968, the jury found appellant guilty on both counts of the indictment. Appellant was sentenced to jail on November 22, 1968 for a period of five years to fifteen years. The indictment against the co-defendant, Charles Clary, was dismissed on September 30, 1968.

Three witnesses were used by the Government in the trial of the case. The first witness was the complaining witness who testified (Tr. 31-37) that the delicatessen in which he was employed as night manager was robbed of money around midnight on January 12, 1967. He testified (Tr. 35-36) that appellant participated in the robbery. The second witness was the wife

of the co-defendant, Charles Clary, who testified (Tr. 65-68) that on the night of January 12, 1967 she overheard a conversation between appellant and the co-defendant in which the appellant said that he and the co-defendant planned to rob the delicatessen. The third witness, the wife of appellant, was used on rebuttal. She testified (Tr. 105-107) that she saw appellant in the company of the co-defendant on January 12, 1967, and saw him again in the early morning hours of January 13, 1967 when he entered her apartment carrying a sawed off shotgun. This testimony was used by the Government in rebuttal of the testimony of appellant and another witness (Tr. 88-90, 97-99) that appellant was in Philadelphia, Pa. during the time of the robbery. A police officer also testified in the case. He was called to the stand by appellant. His testimony (Tr. 79-81) related to the "look-out" decriptions of the individuals involved in the robbery none of which, according to appellant, fit his description.

STATUTES INVOLVED

DISTRICT OF COLUMBIA CODE

§ 22-2901. Robbery

Whoever by force or violence, whether against resistance

or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar 3, 1901, 31 Stat. 1322, ch. 854. §804)

§§ 22-502. Assault with intent to commit mayhem or with dangerous weapon.

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854. §§804)

§ 14-306. Husband and wife.

(a) In civil and criminal proceedings, a husband or his wife is competent but not compellable to testify for or against the other.

(b) In civil and criminal proceedings, a husband or his wife is not competent to testify as to any confidential communications made by one to the other during the marriage. (Dec. 23, 1963, 77 Stat. 519, Pub. L. 88-241, §1, eff. Jan. 1, 1964)

STATEMENT OF POINTS

The appellant, Frank Lewis, intends to rely on the following points on appeal:

1. Error was committed in permitting the Government, over the appellant's objection, to use his wife as a witness against him, even though she offered no objection in open court to so testifying, and in allowing the witness to testify concerning confidential communications.

2. The unwarranted delay between the time the indictment was returned and the date of trial prejudiced appellant's ability to defend himself and constituted reversible error.

3. Appellant was entitled to a preliminary hearing notwithstanding the fact that he was arrested upon the return of an indictment, and the failure to afford a preliminary hearing denied him due process of law.

4. The photographs shown to the complaining witness were so unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process of law.

ARGUMENT

I

TESTIMONY OF APPELLANT'S WIFE
(Refer to Tr. 32, 103, 105-107, 119)

The principal inquiry to be made in this case is whether the trial judge erred in permitting the Government, over the appellant's objection, to use his wife as a witness against him, even though she offered no objection in open court to so testifying. In this we are dealing with an ancient rule of incompetency which has been changed by statute into one of privilege, personal to the witness-spouse either to elect or refuse to testify against the other.

Appellant's wife, Annie Durham Lewis, was called as a witness on rebuttal in behalf of the Government. Before the wife testified, counsel for appellant in a bench conference raised an objection to the competency of the witness to testify. The following colloquy occurred in the bench conference. (Tr. 103):

> MR. HUNTER: Your Honor, before this witness is permitted to testify, I would like to voice an objection to her taking the witness stand. She is the wife of the defendant.
>
> THE COURT: He can't have two wives. You just put his wife on.

MR. HUNTER: His wife didn't take the stand.

THE COURT: His wife's mother took the stand and said that she was married to the defendant.

MR. HUNTER: But that took place after this marriage.

THE COURT: I understand. What do you want me to tell this woman?

MR. HUNTER: I was going to object to any testimony generally.

THE COURT: It's overruled.

Proceed

In sum, the witness testified (Tr. 105-107) that she saw appellant on January 12, 1967 at an apartment in the District of Columbia with Charles Clary, a co-defendant, who is married to her niece, Winnie Clary, a witness presented by the Government. This is the date on which the offenses occurred. The witness testified that appellant left the apartment late that night. She again saw appellant in the early morning hours on January 13, 1967. She testified that he entered the apartment carrying a "sawed off shotgun." Testimony was presented in behalf of the Government by Isaac M. Joseph (at Tr. 32) that a shotgun and rifle were used at the time the offenses were committed.

Much use was made of the testimony of the wife during the closing argument by counsel for the Government (at Tr. 119).

It was error for the trial court to allow the Government, in the face of any objections by appellant, to introduce the wife of appellant as a witness and to allow her to testify against him. Her introduction as a witness and the testimony she gave had a damaging effect on the jury and, therefore, is so prejudicial as to warrant a reversal of conviction.

Under the statutes of the District of Columbia, Title 14, Section 306 D. C. Code, it is provided:

> "In civil and criminal proceedings, a husband or his wife is competent but not compellable to testify for or against the other."

It is not denied that this statute abrogates the common law rule as far as this jurisdiction is concerned, and while a wife can refuse to testify against a husband the latter cannot by objection prevent her from doing so if she chooses to do it. But in this case there is nothing to indicate that the wife was given an opportunity to exercise her privilege not to testify against her husband. Granted that Government counsel did ask the witness in open court (at Tr. 105) whether she desired to testify and she said "I do;" however, this is not the

kind of an inquiry contemplated by the statute. As this court said in Postom v. United States, 322 F. 2d 432 (D. C. Cir 1963) cert. denied 376 U. S. 817, in giving consideration to Title 14, Section 306 D. C. Code:

> "Because of the quoted provision of the District of Columbia Code, we think that, outside the presence of the jury, the trial judge should tell one who is called to testify for or against his spouse that his testimony cannot be compelled but may be received if volunteered . . . . ."

The trial judge did not tell appellant's wife "outside the presence of the jury" that her testimony could not be compelled but could be received if volunteered. It appears from the record (Tr. 103) that the trial judge recognized this statutory obligation when he inquired of counsel at the bench conference "I understand. What do you want me to tell this woman?" Counsel replied, "I was going to object to any testimony generally." At this point the trial judge overruled the objection.

Title 14, Section 306 D. C. Code also provides as follows:

> "In civil and criminal proceedings, a husband or his wife is not competent to testify as to any confidential communications made by one to the other during the marriage."

Thus while the competency of husband and wife as witnesses has

been effected and enlarged by statute, there has been no alteration of the incompetency of a spouse to testify as to any "confidential communications" made by one to the other during the marriage.

In this case, the testimony of appellant's wife that she saw him with a "sawed off shotgun" resulted from a confidential communication on his part. It, therefore, was error to permit this testimony.

Certainly, the wife's knowledge gained by observance of appellant's conduct in bringing to the apartment a "sawed off shotgun" in the early morning hours was the result of a confidential communication on his part. It cannot be supposed that appellant would have so conducted himself except in reliance upon the free and unrestrained privacy of the marital relations and the socially desirable confidence which exists, and should exist, between husband and wife.

The record makes plain that appellant made no effort to conceal or disguise his conduct at the apartment from his wife. He was, in a word, confiding in her the information disclosed by his conduct. Clearly, if appellant had told his wife he had just committed a crime she could not have been permitted

to testify to conduct transpiring in her presence in the apartment which clearly, though not orally, communicated the same fact to her.

The term "communications" means more than mere oral communications or conversations between husband and wife. It includes knowledge derived from the observance of disclosure facts done in the presence or view of one of the spouses by the other because of the confidence existing between them by reasons of the marital relation and which would not have been performed except for the confidence so existing. An act may communicate knowledge to the known observer and repose a confidence in him as clearly and unmistakably as if accompanying descriptive words were uttered. People v. Daghita, 86 N. E. 2d 172, 174 (Appls. Ct. N. Y. 1949). In Menefee v. Commonwealth, 55 S. E. 2d 9, 13-15 (S. Ct. of Appls. Va. 1949), the court, after an exhaustive examination of cases under statutes similar to that found in this jurisdiction, said (at p. 15), "The weight of authority, and in our opinion, on principle, the better view, extends the privilege beyond mere utterances or written words."

II

DELAY BETWEEN INDICTMENT AND TRIAL
(Refer to Tr. 4, 96-97)

The unwarranted delay between the time the indictment was returned on October 9, 1967 and the date of trial on September 26, 1968 prejudiced appellant's ability to defend himself and constituted reversible error. This was brought to the attention of the trial court by counsel in the following colloquy (Tr. 4):

> MR. HUNTER: On behalf of Defendant Frank Lewis, I would interpose a motion to dismiss for lack of speedy trial. This offense took place January, 1967, January 12th, I believe it was. The Defendant Lewis, because of his lack of speedy trial, was denied the opportunity to even have a preliminary hearing.
>
> THE COURT: What are you waiting now for to file your motion? You are allowed 20 days. Why didn't you file it within the time?
>
> MR. HUNTER: Well, I didn't realize at the time, Your Honor, that there would be a witness who would be unavailable for trial today until recently.
>
> THE COURT: That is denied.

The delay thus prevented appellant from having a witness available in his defense at the trial. (It is understood an alibi witness became unavailable.) This substantially

prejudiced his rights in the trial of the case.

No valid excuse is given by the Government from the long delay in bringing appellant to trial. Certainly the excuse cannot be that he was in actuality a fugitive and the Government had difficulty apprehending him. Any such excuse has a hollow ring since appellant was in the military service at the time the indictment was filed and could conveniently have been brought to this jurisdiction for arraignment and trial.

The following testimony of appellant(Tr. 96-97) establishes that he was in the military service, and that no attempt was made by the Government to return him to this jurisdiction:

Q You are presently in the Army, in the Armed Forces?

A Yes.

Q. Were you likewise a member of the Armed Forces in January of 1967?

A I was.

Q. When did you go in the service?

A January 25th.

Q. January 25th?

A. Yes.

Q. When did you first discover, Mr. Lewis, that you were being charged with the

robbery that took place in Sam's Delicatessen on January 12, 1967?

A June 5th, 1968.

Q Wherewere you at that time?

A At Fort Myer, Virginia.

Q What year was it, did you say?

A '68, this year.

Q That was this year?

A Yes.

Q Prior to that time were any efforts made to have you brought here to face charges in this case?

A No, it wasn't.

Appellant had a constitutional right to a speedy trial (U. S. Const. Amend. VI), a right which is implemented by Rule 48b of the Federal Rules of Criminal Procedure. The constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. Mann v. United States, 304 F. 2d 394 (D. C. Cir. 1962) The constitutional right to a speedy trial is enforced by dismissal of the charge when there has been unnecessary delay in bringing the case to trial. United States v. Gunther, 259 F.

2d 173 (D. C. Cir. 1958). The failure of the lower court to dismiss constitutes reversible error.

III

NO PRELIMINARY HEARING
(Refer to Tr. 4)

Appellant having been arrested for a felony was entitled to a preliminary hearing. No preliminary hearing was held. Therefore, appellant was denied due process of law. The fact that appellant was arrested under a warrant issued upon the return of an indictment did not obviate his right to a preliminary hearing. The return of an indictment did not make a preliminary hearing unnecessary. Rule 5 of the Federal Rules of Criminal Procedure states only one condition on which the preliminary hearing can be dispensed with when an individual is arrested under a warrant issued upon a complaint or without a warrant. That condition is a waiver of the hearing. There was no waiver here. Therefore, the rule is mandatory in its terms.

In discussing whether the return of an indictment would obviate the right to a preliminary hearing, the Court of Appeals said in Blue v. United States, 342 F. 2d 894, 899 (D. C. Cir. 1965), cert. denied 380 U. S. 944:

". . .We do not believe, however, that

> the mere existence of an indictment renders academic any defects in the Commissioner's proceedings or necessarily insulates those defects from judicial correction.
>
> * * *
>
> We think, on the contrary, that the express preoccupation of Congress with preliminary hearings in the Legal Aid Act denotes a legislative recognition and acceptance of the view that criminal prosecution is a continuous and unitary process, and that each stage along the way has its own intrinsic importance as well as a frequently significant relationship to the final result. Preliminary inquiries can on occasion have great value for one charged with crime. Where a defendant is denied out of hand the opportunity to consider utilizing that value, we do not think that that denial is to be swept under the rug of a grand jury indictment. ."

The Court added (at p. 901) that a preliminary hearing has two purposes. One is to afford the accused an opportunity to establish that there is no probable cause for his detention, and the second is to give him an opportunity to learn in advance of trial the foundation of the charge and the evidence that will comprise the Government's case against him. While the return of an indictment perhaps serves the first purpose, it does not serve the second purpose. The Blue case made it clear that the second purpose is sufficiently important that an individual is entitled to a preliminary hearing even after an indictment.

Crump v. Anderson, 352 F. 2d 649(D. C. Cir. 1965), appears to be irreconcilable with the Blue case. However, the Crump case did not expressly overrule the Blue case. It seems, therefore, that it is appropriate for appellant to rely on the Blue case. (See also Ross v. Sirica, 380 F. 2d 557 (D. C. Cir. 1967).

IV

IDENTIFICATION PHOTOGRAPHS
(Refer to Tr. 56-58, 74, 79-86; Exh. No. 3)

Appellant was born on November 15, 1946 and at the time the robbery was committed he had not reached the age of twenty one. Yet the "look-out" description for the individual who was supposed to be appellant spoke in terms of a Negro male, "26 years of age." The "look-out" also spoke in terms of a person, "six-foot-two, heavy build, light skin, brown jacket, armed with a rifle." The record establishes that this description does not fit appellant. In fact, the Government's witness Clary when asked (Tr. 74) whether she considered appellant to be heavy built answered "No." When asked (Tr. 74) whether she considered appellant to be a light skinned person witness Clary answered "No."

According to the testimony of a police officer called to the stand by appellant (Tr. 79-81), the "look-out" descriptions were based on a report made by an officer who had made an "on-scene" investigation of the robbery. The "look-out" descriptions found in this "on-scene" report were given to the officer by the complaining witness. This is clear from the following testimony (Tr. 56-58):

Q . . Now after the robbery took place in January, Mr. Joseph, did the police come immediately to the scene?

A I don't remember how long, but it didn't take them very long after I called them.

Q Half an hour, fifteen minutes?

A I don't know that.

Q Did you give them a description at the time that they came?

A As well as I could remember, yes; as far as the clothes are concerned.

Q What about facial features?

A As well as I could, facial features.

Q And you could remember pretty well at that time?

A I guess, I don't know. I don't remember what I told them. I don't remember even the report.

Q But you remember this defendant today?

A Yes, I do. I remember his face.

Q Then you probably gave a pretty good description on that day, I take it?

A I don't remember what the report was. I don't remember what I gave them.

Q But you did give them a description, to the best of your recollection?

A To the best of my knowledge I did, yes.

There was further testimony (Tr. 51-52, 82-86) that the complaining witness had been shown photographs by the police of possible suspects, and that among the photographs were persons of the Caucasian race. The complaining witness selected one which he said "looked like one of the suspects that held him up." (Tr. 82-86) The photograph selected by the complaining witness turned out to be that of appellant. (Tr. 83-84; Exh. No. 3) In view of the fact that the description which complaining witness gave to the police immediately following the robbery did not fit that of appellant, it is difficult to understand how the complaining witness could arrive at a correct identification at a later date on the basis of a photograph.

While the complaining witness testified (Tr. 51-52) that he preferred "to see the individual in person" before identifying him there can be no doubt that the "identification" occurred at the time the photographs were shown to him. The effect was the same as a line-up. As pointed out in United States v. Wade, 388 U. S. 218, 229(1967):

> "Moveover, '(i)t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absense of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" (Footnote omitted.)

It is submitted that the photographs shown to the complaining witness were so unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process of law. Having placed photographs of persons of the Caucasin race among the photographs, the effect was the same as showing the complaining witness only appellant's photograph. (Cf. Stovall v. Denno, 388 U. S. 293, 302(1967.)

CONCLUSION

Appellant submits that because of the errors set forth

herein, he was not given a fair trial. The judgment of the lower court therefore should be reversed.

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Certificate of Service

I hereby certify that a copy of the foregoing brief was mailed to the U. S. District Attorney, Appeals Division, U. S. Court House, Washington, D. C. 20001, this 14th day of April, 1969.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,641

UNITED STATES OF AMERICA,

Appellee

v.

TYRONE A. HORTON,

Appellant

APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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TABLE OF AUTHORITIES

(Cases principally relied on are marked with an asterisk*)

STATEMENT OF QUESTIONS PRESENTED

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II. DID THE TRIAL JUDGE ERR IN PERMITTING THE PROSECUTION TO USE A ATTEMPTED UNAUTHORIZED USE CONVICTION TO IMPEACH THE CREDIBILITY OF THE APPELLANT OVER DEFENSE OBJECTION?

III. DID THE TRIAL JUDGE ERR IN FAILING TO RULE THAT THE ARREST OF THE APPELLANT WAS ILLEGAL?

(This case has not previously been before this Court)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,641

UNITED STATES OF AMERICA

Appellee

v.

TYRONE A. HORTON

Appellant

APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellant and one James W. Hunt (not an appellant in this case) were indicted jointly on February 5, 1968, for robbery (22 D.C. Code 2901) and assault with intent to commit robbery (22 D.C. Code 501). On June 10, 1968, counsel for appellant filed a "Motion for Mental Observation," on August 12, 1968, a "Motion to Suppress Evidence," and on July 22, 1969, a "Motion to Exclude Defendant's Prior Conviction From Introduction into Evidence." A pre-trial hearing was held on July 17 and 18, 1969, and the case was tried before a jury, Honorable William B. Jones presiding, on July 22, 23, 24, and 28, 1969. On July 28, 1969, appellant was convicted of robbery. On October 10, 1969, appellant was sentenced by Judge Jones to serve one to four years,

said sentence to run consecutively to any sentence being served at the time of sentencing. On October 15, 1969, appellant filed a notice of appeal. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1291 (1964).

STATEMENT OF THE CASE

On December 13, 1967, as Donna Cope (since married at the time of the trial with last name changed to Viert, and identified in this Brief as Mrs. Cope-Viert) and her roommate, Miss Brenda Renterio (not available at trial) were returning to their apartment from a grocery shopping trip. As they approached the entrance to their apartment at 1111 Massachusetts Avenue, N.W. and were moving the groceries into the apartment building, Mrs. Cope-Viert was tapped on the left arm from behind and she turned half way around to find herself struggling over her purse with a young Negro, slender of build. (Pretrial Tr. 15) This struggle continued for about 2 minutes (Pretrial Tr. 16) during which time she was able to view the robber, "Long enough to see his face and to notice what he had on and to judge his weight." (Pretrial Tr. 20) Then the purse strap broke and the robber fled toward Massachusetts Avenue. Mrs. Cope-Viert then "sort of went into hysterics. I ran a few steps down the Street, and I was screaming for help," and as she turned around and was telling her roommate to call the police Mrs. Cope-Viert was struck in the face by a boy who ran by her and continued running down the street. (Pretrial Tr. 20) A policeman in civilian clothes who lived in the apartment building came running out and Mrs. Cope-

Viert gave him a description and this individual left. Eight or 10 minutes later a uniformed officer appeared and Mrs. Cope-Viert described the boy who had grabbed her purse as wearing a red shirt with a dark red sweater or pullover, about her own height (5'6"), slender, with a hat. (Pretrial Tr. 23) The officer respnnded that the police had apprehended 2 suspects who matched the descriptions. (Pretrial Tr. 23) Mrs. Cope-Viert was then transported in the officer's car in an attempt to locate her missing purse, during which time she was told that her billfold had been found, and she was "led to believe" that it had been found on the 2 suspects who had been apprehended. (Pretrial Tr. 26) Mrs. Cope-Viert was with the police when her purse was found in an alley 2 or 3 blocks from the site of the crime. (Pretrial Tr. 26)

Mrs. Cope-Viert and her roommate were then taken to no. 2 precinct, which was 5 or 6 blocks from the scene of the crime. (Pretrial Tr. 75-76; 134) Mrs. Cope-Viert testified: "Well, when we arrived at the police station, the paddy wagon was already there. And they made a comment that they had already brought the two suspects in." Q: "So you assumed the suspects were there?" A: "Yes." (Pretrial Tr. 75)

Mrs. Cope-Viert and her roommate entered the police station through a back entrance and walked through a room of approximately 11 square feet where they observed the defendant (wearing a red shirt, red sweater, hat, dark trousers) and the second suspect. Mrs. Cope-Viert assumed that appellant and his companion were the two suspects. (Pretrial Tr. 26-27) Also in the room were

some officers and 5 white marines. (Pretrial Tr. 26-27) Appellant and the second suspect were the only two Negroes in the room (Pretrial Tr. 76) and no one was standing next to or in the vicinity of appellant and the second suspect. (Pretrial Tr. 32) Mrs. Cope-Viert and her roommate went into another room and talked with police for about 15 minutes (Pretrial Tr. 29) during which time "we were asked if the two suspects outside were the same ones." (Pretrial Tr. 79) Mrs. Cope-Viert and her roommate together went back into the room and viewed appellant and the other suspect for about one minute and stated that they were the two individuals who had been engaged in the robbery. (Pretrial Tr. 79-80) The next day, at a preliminary hearing, with appellant wearing the same red shirt as at the station, Mrs. Cope-Viert again made an identification of appellant.

Appellant's arrest. Officer Ninetchka and his colleague, Officer O'Sullivan, were walking a beat at 9th and M Streets, N.W. about 7 P.M. on December 13, 1967, when Officer Ninetchka heard a lookout on his footman's radio for a robbery at 11th Street which advised to look out for a Negro male in a red shirt or sweater. (Pretrial Tr. 102-03) At the corner of 9th and M the officers observed 2 Negro males walking toward them (toward 8th Street), one wearing a red sweater. (Pretrial Tr. 103) The officers stopped appellant and his companion, asked them for identificatinn, and informed them there had been a robbery on 11th Street. At 7:15 or 7:20 Officer Ninetchka called back to the scene of the robbery on his footman's radio stating that he had two suspects, one wearing a red sweater. The answer was:

"That's them." (Pretrial Tr. 103-04) Appellant and his companion were then transported in a cruiser back to 11th and Massachusetts Avenue, after being asked if they would return to the scene of the robbery and they responded they would. (Pretrial Tr. 105) At the scene several marines were brought up to the cruiser and identified the two as the ones who had been involved in the robbery. (Pretrial Tr. 140) While they were still in the cruiser a Sergeant Meado observed a slight motion of the arm of appellant's companion, and after both had been removed from the cruiser Meado searched the cruiser and found a billfold, which it turned out belonged to Mrs. Cope-Viert. (Pretrial Tr. 139-40)

SUMMARY OF ARGUMENT

I. IT WAS ERROR TO FAIL TO SUPPRESS THE IN-COURT IDENTIFICATION OF THE COMPLAINING WITNESS WHERE THE FACTS REVEALED THAT SOME 8 TO 10 MINUTES AFTER THE COMPLAINANT WAS ROBBED OF HER POCKETBOOK SHE WAS TOLD THAT 2 SUSPECTS MATCHING THE DESCRIPTION SHE HAD GIVEN THE POLICE HAD BEEN APPREHENDED AND THAT HER BILLFOLD HAD BEEN RECOVERED (SHE ASSUMING RECOVERED FROM THE SUSPECTS), THE COMPLAINANT AND THE POLICE THEN FOUND HER PURSE IN AN ALLEY 2 or 3 BLOCKS FROM THE SCENE, SHE WAS TAKEN TO THE POLICE STATION 5 OR 6 BLOCKS FROM THE SCENE AND THERE SAW A PADDY WAGON AND WAS TOLD THE SUSPECTS WERE ALREADY AT THE STATION. INSIDE THE STATION SHE WALKED THROUGH A ROOM WHERE SHE VIEWED APPELLANT AND HIS COMPANION AS THE ONLY NEGROES IN THE VICINITY, THE APPELLANT WEARING A RED SWEATER, MATCHING THE DESCRIPTION SHE GAVE POLICE. IN ANOTHER ROOM THE COMPLAINANT

WAS ASKED WHETHER THE "TWO SUSPECTS OUTSIDE WERE THE SAME ONES," WHEREUPON SHE WENT INTO THE ROOM AGAIN WITH HER ROOMMATE AND VIEWED APPELLANT.

II. THE TRIAL JUDGE ERRED IN PERMITTING THE PROSECUTION TO USE A CONVICTION FOR ATTEMPTED UNAUTHORIZED USE OF A MOTOR VEHICLE TO IMPEACH THE CREDIBILITY OF THE APPELLANT, SUCH A CRIME NOT REFLECTING ON CREDIBILITY.

III. THE TRIAL JUDGE ERRED IN RULING THAT THE ARREST OF APPELLANT WAS LEGAL WHERE THE EVIDENCE REVEALED THAT APPELLANT WAS APPREHENDED WHILE WALKING DOWN THE STREET WITH A COMPANION WEARING A RED SHIRT, THE APPREHENSION BEING MADE ON THE BASIS OF A LOOKOUT FOR A NEGRO MALE IN A RED SHIRT OR SWEATER INVOLVED IN A ROBBERY.

ARGUMENT

I.

THE TRIAL JUDGE FAILED TO SUPPRESS THE IN-COURT IDENTIFICATION OF THE COMPLAINING WITNESS WHERE THE FACTS REVEALED THAT AFTER THE COMPLAINANT WAS ROBBED OF HER POCKETBOOK BY A ROBBER AND HIS ACCOMPLICE AND WHILE GIVING A DESCRIPTION TO THE POLICE SHE WAS TOLD THAT 2 SUSPECTS HAD BEEN APPREHENDED AND THEN THAT HER BILLFOLD HAD BEEN RECOVERED (SHE ASSUMING RECOVERED FROM THE SUSPECTS). UPON ARRIVING AT THE STATIONHOUSE SHE WAS TOLD THE SUSPECTS WERE ALREADY THERE, PASSED THROUGH A ROOM AND VIEWED APPELLANT AND THE SUSPECT, THEY BEING THE ONLY NEGROES IN THE ROOM. AFTER TALKING TO POLICE COMPLAINANT AND HER ROOMMATE WERE THEN ASKED TO RETURN TO THE ROOM AND SEE IF THE 2 SUSPECTS IN THE ROOM WERE THE SAME ONES WHO WERE INVOLVED IN THE ROBBERY, WHEREUPON THE COMPLAINANT AND HER ROOMMATE VIEWED APPELLANT UNDER THE SAME CIRCUMSTANCES AS PREVIOUSLY.
(Pretrial hearing 1-181)

Although United States v. Wade, 388 U.S. 218 (1967) arose in the context of a formal post-indictment lineup, its requirement of counsel has been held applicable to informal, pre-arrest confrontations which take place at the station house. E.g., Long v. United States, No. 22,218 (Dec. 18, 1969). Both the Supreme Court and the Court of Appeals have condemned the practice of exhibiting a lone suspect to a witness for identification. E.g., Stovall v. Denno, 388 U.S. 293 (1967); Clemons v. United States, No. 19,846 (Dec. 6, 1968). Whether or not such a confrontation

amounts to a violation of due process depends upon the "totality of the circumstances." Stovall v. Denno, supra at 302.

In the instant case the judge found that the confrontations at the station house and the confrontation at the preliminary hearing were a violation of due process. The judge went on to find, however, that there was an independent source sufficient to enable the complainant to identify the appellant in court. The government must establish the independent source by clear and convincing evidence. United States v. Wade, supra.

The Court of Appeals has used various factors to determine whether or not there is sufficient evidence of an independent source. These factors are:

1. The circumstances under which the witness had an opportunity to observe the perpetrator of the crime. These cases have focused on the lighting, Long v. United States, No. 22,218 (Dec. 18, 1969) (daylight); Gregory v. United States, No. 21,089 (Mar. 18, 1969) ("conditions of good lighting"); Russell v. United States, No. 21,571 (Jan. 24, 1969) ("the area was well-lighted, and that daylight was breaking."), the length of time the witness had to observe the perpetrator, Gregory v. United States, supra (witness watched perpetrator for 3 or 4 minutes); Frazier v. United States, No. 21,426 (Mar. 14, 1969) (robbery took from 6 to 10 minutes), the state of mind of the witness, including whether the witness was a victim or an observer, Hawkins v. United States, No. 21,997 (July 9, 1969) (no showing that witness in a distraught state of mind); Gregory v. United States, supra (witness not a victim); Williams v. United States, No. 21,072 (Feb. 24, 1969) (witness displayed coolness during robbery), and the distance from which the witness observed, Long v. United States, No. 22,218

(Dec. 18, 1969) (witness viewed perpetrator at close quarters).

In the instant case the purse-snatching took place at approximately 7 P.M. on December 13, 1967. At that time it was dark, although the witness testified that the area was illuminated by a light some 8 feet from the scene of the crime. The witness testified that she struggled with the robber over her purse for some 2 minutes, and during this time she was able to discern he was a Negro male wearing a red shirt, a red outer shirt, dark trousers, a hat, was slender of build, and was about the complainant's height. Her state of mind is evidenced by her testimony that following the taking of her purse she "sort of went into hysterics." (Pretrial Tr. 20)

2. Another factor the Court of Appeals has found significant is whether the description given by the witness was detailed and whether the description was accurate. E.g., Cunningham v. United States, No. 21,450 (Feb. 19, 1969) (witness noted a distinctive scar on her assailant's face); Hawkins v. United States, No. 21,997 (July 9, 1969) (description given of defendant considerably more detailed than description given of other two robbers); Gregory v. United States, No. 21,089 (Mar. 18, 1969) (description substantially accurate as to height and weight); Arthur Williams v. United States, No. 21,072 (Feb. 24, 1969) (witness gave careful description of perpetrator and his clothing).

In the instant case the complainant gave a description of the robber which matched the description of the appellant insofar as clothing, build, and height were concerned, but unlike cases such as Cunningham and Clemons, no distinctive physical

characteristics were given in the description

3. The Court of Appeals has found it very significant when a witness has shown an ability to discriminate among suspects, choosing certain ones and eliminating others, as in Hawkins v. United States, No. 21,997 (July 9, 1969). In the instant case the complainant viewed two suspects and picked them both as having been involved in the robbery. This despite the fact that the complainant testified she was in the presence of one of the robbers for about two minutes while she testified that the accomplice ran by after her purse had already been taken and struck her in the face, and continued running down the street. The evidence presented at the pretrial hearing revealed that the complainant only gave a description of the first robber and in fact nowhere at the hearing did she describe the second robber. Even so, when she viewed the appellant and his companion she picked out both as having been involved in the robbery.

4. In Frazier v. United States, supra and all three cases in Clemons v. United States, supra, the Court of Appeals found it significant that the witnesses had made a fair photographic identification prior to the confrontation. In the instant case there was no prior photographic identification.

5. In some cases the Court of Appeals has placed reliance on whether a witness stated that his in-court identification was was based on his recollection from the crime and not from the illegal confrontation. In the instant case the complainant did state that as between the view of the perpetrator at the scene of the crime and her view at the illegal confrontations the

view at the time of the crime made the bigger impression upon her mind. (Pretrial Tr. 82)

Conclusion: It was error for the trial judge to fail to suppress the in-court identification of the appellant by the complainant. The complainant viewed the robber at nighttime, in an area lighted by a light some 8 feet away while struggling with the robber over her purse, following which she "sort of went into hysterics." The description given by the complainant was accurate insofar as it went (clothing, height, build) but failed to include any physical characteristics. Although the complainant viewed one of the robbers for only a very short period of time, when she viewed the two suspects she failed to discriminate between them.

II.

THE TRIAL JUDGE ERRED IN PERMITTING THE PROSECUTION TO USE A ATTEMPTED UNAUTHORIZED USE OF A MOTOR VEHICLE CONVICTION TO IMPEACH THE CREDIBILITY OF THE APPELLANT, SUCH A CONVICTION NOT REFLECTING ON CREDIBILITY.

(Appellant's "Motion to Exclude Defendant's Prior Conviction From Introduction Into Evidence and Points and Authorities; Pretrial Tr. 187-235; Trial Tr. 385-464)

Under the Luck-Gordon rule a witness may be impeached by evidence of a prior criminal conviction that is relevant to credibility. In United States v. Carr, No. 22,373 (July 22, 1969) the Court of Appeals recognized the absence of any probative relationship between a non-specific intent crime and credibility.

stating:

> Under these guidelines the trial judge was clearly correct in permitting use of the larceny conviction s for impeachment in this case, since this is a crime reflective of diminished honesty and integrity. The misdemeanor of taking property without right is not, however, to be equated with larceny or other charges of dishonest conduct properly related to credibility. This misdemeanor has been distinguished from larceny, in that "proof of a specific criminal intent to deprive an owner of his property permanently is absent." It has been held not to be the act of a "thief" in certain criminal context. While "joyriding" is conduct that may not be tolerated lightly, it has elements bringing it within the category of "impulsive" crimes and should not be deemed the kind of larcenous act that is routinely considered to reflect on credibility and hence constitutes permissible impeachment. Id. at 3-4 of slip opinion.

In United States v. Lucas, No. 23,162 (April 8, 1970) stated: "We agree that under our opinion in United States v. Carr [supra] the offense of taking property without right, 22 D.C. Code §§ 1201 (1967), does not bear on credibility and that in essence unauthorized use of a vehicle is a similar offense." The Court went on to affirm, however, noting that in Lucas it was the appellant who had introduced the evidence of the prior conviction and under such circumstances he had no cause to complain on appeal.

In the instant case the defense requested the court to exclude the appellant's prior conviction, a June, 1968, conviction for attempted unauthorized use of a motor vehicle. At a pre-trial hearing the trial judge allowed the appellant to give his version of the case. The government was permitted to cross-examine. Following the hearing the judge ruled that the prior conviction would be admissible. (Pretrial Tr. 235) Prior

to trial defense counsel filed a motion to exclude the appellant's prior conviction. In the memorandum defense counsel stated that the appellant would be the only witness to testify concerning the disputed facts in the case on behalf of the defense, that the government would argue the inference of the appellant's guilt from the possession of recently stolen property, that the offense of attempted unauthorized use of a motor vehicle was a "low level larceny crime, which statutorily includes using and being present in a car knowing it is stolen. One can be convicted of unauthorized use, or attempted unauthorized use without ever having stolen or aided and abetted same." Referring to the motion the judge stated he was "unimpressed" and went on to state that the crime of attempted unauthorized use involved an intent to commit a particular crime with action reasonably adapted to the accomplishment of that end. The trial judge concluded: "I don't consider it a low statutory crime. I consider it a crime of a larcenous nature," and ruled the conviction admissible. (Tr. 388-89)

Under the rationale of Carr and Lucas it was error for the trial judge to permit the prosecution to impeach the credibility of the appellant with a conviction for attempted unauthorized use of a motor vehicle. Appellant was the only defense witness to testify concerning the disputed facts in the case (whether he committed the crime or simply happened to be in the area at the time). Under these circumstances the prior conviction was extremely prejudicial and constituted reversible error.

III

THE TRIAL JUDGE ERRED IN FAILING TO RULE THAT THE ARREST OF THE APPELLANT WAS ILLEGAL WHERE THE FACTS REVEALED THAT THE APPELLANT WAS APPREHENDED IN THE 900 BLOCK OF M STREET AFTER THE APPREHENDING OFFICER HEARD A LOOKOUT ON HIS FOOTMAN'S RADIO FOR A ROBBERY ON 11th STREET INVOLVING A NEGRO MALE IN A RED SHIRT.

(Pretrial Tr. 1-148; 182-87)

A police officer can make a warrantless arrest when he personally observes the commission of a felony or misdemeanor in his presence or when he obtains reliable information that a felony or certain misdemeanor has been or is being committed. Wong Sun v. United States, 371 U.S. 471 (1963). Although a police officer may not arrest upon mere suspicion, Spinelli v. United States, 393 U.S. 410 (1969), under recent Supreme Court decisions the law of arrest has been somewhat loosened so as to allow the police to stop and, under certain circumstances, to frisk an individual without having probable cause to do so. Terry v. Ohio, 392 U.S. 1 (1968). Where it is important to determine whether or not a confrontation amounted to an arrest it is helpful to look at Kelley v. United States, 111 U.S. App. D.C. 64, 298 F.2d 310 (1961). In Kelley the defendant, while sitting in a restaurant, was approached by two police officers who told him to come outside in order that they might talk with him. Outside the officers asked the defendant some routine questions and then asked him what he had in his pockets. When the defendant admitted he had marijuana in his pocket the

police testified that at this point they "arrested" him. The Court of Appeals found, however, that the arrest took place when the police told the defendant to step outside due to the fact that at that point the defendant "was restrained of his liberty and so understood . . ." Id. at 398, 298 F.2d 312. Where the government contends that there in fact was no arrest of the defendant, but that the defendant consented to accompany the officers there is a high burden of persuasion on the government to establish this consent. Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649 (1951).

In the instant case the testimony concerning the apprehension of the appellant was given by Officer Ninechka who testified that while he and Officer O'Sullivan were walking a beat on the 900 block of M Street, N.W. about 7 P.M. on December 13, 1967, Officer Ninechka heard a lookout on his footman's radio for a Negro male in a red shirt or sweater involved in a robbery on 11th Street. (Pretrial Tr. 102-03) At the corner of 9th and M Streets he and his partner observed 2 Negro males walking in an easterly direction (toward 8th Street), one of them wearing a red sweater. The officers stopped appellant and his companion and informed them there had been a robbery on 11th Street. Neither suspect attempted to run or evade when stopped, neither was prespiring, nor did either attempt to discard any items that were on their persons when they were observed by the officers. (Pretrial Tr. 104; 109) Officer Ninechka then called back to the scene on his radio and notified them that "we have two subjects and one was wearing a red sweater." The response was "That's

them." (Pretrial Tr. 103-04) Officer Ninechka testified that "We asked them if they would go back [to the scene] and they said yes." (Pretrial Tr. 105) Both officers were in uniform and the pistols they were carrying were visible. The officer testified that the appellant and his companion "both responded they had no objection to going back." (Pretrial Tr. 106) The officers conducted a preliminary pat down of both subjects and then both subjects were tranported in a vehicle back to the scene. (Pretrial Tr. 108)

At this point defense counsel asked: "Officer Nenichka, when you asked them to go back to the scene, what would you have done if Mr. Hunt and Mr. Horton said no and attempted to walk away?" An objection to this question was sustained and defense counsel excepted and proffered that if allowed to answer the officer would have responded that despite such an answer by the subjects he would have taken the subjects back to the scene of the robbery. (Pretrial Tr. 109-10)

At the scene of the robbery several marines who had witnessed the robbery were brought up to the vehicle and identified appellant and his companion as having been involved in the robbery. (Pretrial Tr. 141) Sergeant Meado testified that he rode in the cruiser which transported the suspects back to the scene of the robbery. He testified that before the appellant and his companion were removed from the cruiser to be transferred to another vehicle he observed a light motion of the arms of appellant's companion. After both suspects alighted from the cruiser he searched the cruiser and found a billfold, which

turned out to be the complainant's billfold. (Pretrial Tr. 138-40)

In the instant case when the appellant and his companion were first stopped there was no probable cause for their arrest, the only evidence the officers had at that time being a lookout for a Negro male in a red sweater involved in a robbery on 11th Street and the appellant was seen walking on 9th Street with a companion, wearing a red sweater, neither prespiring nor appearing evasive. Although Officer Nenichka testified that he asked appellant and his companion to return to the scene of the robbery and that both agreed to do so, this"consent" was given at a time when the appellant had already been stopped by the police, questioned about a robbery on 11th Street by two uniformed officers with their revolvers visible. "Consent" under circumstances such as these is certainly suspect, and it is submitted the government failed to carry their high burden in establishing such "consent" was a voluntary and knowing consent.

Aside from the question of probable cause for arrest or consent is the question of whether or not the police could properly take the suspects back to the scene of the crime to be viewed by the witnesses, the suspects having been apprehended close in time and place to the scene of the crime and one of the suspects matching the very brief lookout which was broadcast. Such action has been upheld in cases such as Walker v. United States, No. 20,309 (June 17, 1968) (unreported) and Bates v. United States, ___ U.S. App. D.C. __, 405 F.2d 1104 (1968). In

this regard it is submitted that although the arrest of appellant was close in time and place to the robbery, such an arrest is illegal if it fails to meet the standards set forth in cases such as Beck v. Ohio, 379 U.S. 89 (1964) and Henry v. United States, 361 U.S. 98 (1959). These standards were not met in the instant case.

CONCLUSION

WHEREFORE, Appellant respectfully requests that his conviction be reversed.

Respectfully submitted,

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Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was hand-delivered to Appellate Section, Office of United States Attorney, U.S. Court House, Washington, D.C. on this ___ day of May, 1970.

Raymond W. Russell

32-5

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,641

UNITED STATES OF AMERICA

Appellee

v.

FRANK LEWIS

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN GUANDOLO
Counsel for Appellant
Appointed by This Court
1000 - 16th Street, N.W.
Washington, D.C. - 2003

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INTRODUCTION

The major arguments advanced by the Government in its brief are: (1) that the lower court did not commit error in permitting appellant's wife to testify against him, over the

appellant's objection, even though the trial judge did not instruct the wife outside the presence of the jury that her testimony could not be compelled but could be received if volunteered since "the witness testified" before the jury "as to her desire to appear, thus negating any need for further instruction;" (2) that appellant's wife "did not testify concerning any confidential communications received from her husband, but only with regard to her observance of his acts;" (3) that appellant's motion to dismiss for lack of a speedy trial was properly overruled "where no more than a reasonable period of time had elapsed for trial, and no prejudice was shown;" (4) that since an indictment preceded appellant's arrest "he is not enititled to a preliminary hearing as a matter of law inasmuch as the grand jury has already decided the issue of probable cause", and even if he were entitled to such a hearing,"he is far too tardy in requesting it, and does not therefore merit post-conviction relief;" and (5) that "no prejudice was involved" where appellant "was tentatively identified from a series of ten or twelve photographs."

There will be no attempt made to reply to each of the arguments presented by the Government since it would only duplicate

what already has been presented at length in appellant's brief. This reply brief will concern itself only with two points: (1) the question of whether error was committed in permitting appellant's wife to testify concerning confidential communications; and (2) whether error was committed in showing photographs to the complaining witness which were unnecessarily suggestive and conducive to irreparable mistaken identification. (In referring in this reply brief to arguments and contentions made by the Government in its brief, no page numbers were used as they are absent from the Government's brief).

I

A WIFE IS NOT COMPETENT TO TESTIFY AS TO ANY CONFIDENTIAL COMMUNICATIONS MADE BY THE HUSBAND TO HER DURING THE MARRIAGE

It should first be noted that the Government has not met the question presented by appellant that it was error to permit the testimony of his wife that she saw him with a "sawed-off shotgun" as he entered their home in the early morning hours of January 13, 1967 since the wife's knowledge gained by observance of appellant's conduct was the result of a confidential communication on his part.

The Government concedes that the observation of appellant in possession of a shotgun was not in the presence of a third party. Nevertheless, it contends that the testimony of appellant's wife that she saw him with a shotgun did not result from a confidential communication on his part. This contention by the Government lacks support.

The Government admits the "possible application" of the cases cited in appellant's brief /People v. Daghita, 86 N.E. 2d 172, 174 (Appls. Ct. N. Y. 1949); Menefee v. Commonwealth, 55 S. E. 2d 9, 13-15 (S. Ct. of Appls. Va. 1949)/ "with regard to the wife's observation of the appellant's possession of a shotgun," but seeks to have this Court ignore the rulings of such cases on the ground that "there is a conflict of authority with regard to testimony concerning such circumstances." What the Government fails to reveal, however, is that the cases cited in appellant's brief represent the weight of authority. (See e.g. State v. Robbins, 35 Wash. 2d 389, 213 P. 2d 310(1950); People v. Sullivan, 42 Misc. 2d 1014, 249 N. Y. S. 2d 589(1964).)

As stated in 58 Am. Jur. - Witnesses 385:

> "The matter that the law prohibits either the husband or wife from testifying to as witness by

reason of the rule privileging communications between them includes any information obtained by either during the marriage and by reason of its existence. It is not confined to mere statements by one to the other, but embraces all knowledge upon the part of either, obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. . .".

Similarly in 97 C. J. S. - Witnesses 269, it is stated:

"And there are circumstances under which the act of the other spouse is clearly protected by the staturory privilege, as where the act is one which would not have been done by one spouse in the presence or with the knowledge of the other but for the confidence between them by reason of the marital relation. . .".

Finally, the Govenment argues, "If, however, the Court should feel that the testimony of the witness in any way violated the statutory privilege of husband and wife confidential communications, such error would appear to be harmless." The reasoning of the Government is that the wife's testimony "merely served to corroborate the earlier testimony of Winnie Clary, wife of co-defendant Charles Clary, to the effect that both her husband and appellant were present in her home in the District of Columbia on the night the crime was committed." If the Government is correct in this assertion then the question to be asked

is: Why was the wife used as a witness? It must be assumed that the testimony of the wife had a damaging impact on the jury and, therefore, is so prejudicial as to warrant a reversal of conviction. Obviously the Government felt that the wife's testimony would be effective or she would not have been used as a witness. Moreover, much use was made of the testimony of the wife during the closing argument by counsel for the Government. He argued as follows (Tr. 119-120, 120-121):

> "Finally, you had the testimony of Annie Durham Lewis, the first wife, She testified she married the defendant on December 10, 1966. Of course, it is for you to decide her credibility, whether she has a motive to lie, whether she is angry because her husband subsequently, three or four months later, married the second time, or whether or not it colored her testimony to cause her to lie or whether she is telling the truth that she saw her husband, Frank Lewis, the defendant here, in Washington, D. C. on the evening hours of January 12, Thursday, and at 3:00 a.m. Friday morning he came back to the apartment in which the two of them lived at the time and she saw him with a sawed off shotgun and they had an argument as a result of it.
>
> "Of course, Mr. Joseph testifed that one of the men in the robbery used a sawed off shotgun and you compare and relate that testimony." (Emphasis added)
>
> * * * * * * * * * * *
>
> "If you are convinced he has the right man, and if you are convinced that Winnie Clary and Annie Durham Lewis are telling the truth in this case, I submit it is your duty to return a verdict of guilty in this case."

II

THE PHOTOGRAPHS SHOWN TO THE COMPLAINING WITNESS WERE SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION THAT APPELLANT WAS DENIED DUE PROCESS OF LAW

In appellant's brief, it was pointed out (at p. 19) that in view of the fact that the description which the complaining witness gave to the police immediately following the robbery did not fit that of appellant, it is difficult to understand how the complaining witness could arrive at a correct identification on the basis of photographs of possible suspects shown to him by the police. The only answer, as stated in the brief (at p. 20), is that the photographs shown to the complaining witness were unnecessarily suggestive. It was argued, (at p. 20) that having placed photographs of persons of the caucasian race among the photographs, the effect was the same as showing the complaining witness only appellant's photograph. The Government argues that the complaining witness "did not rely on the earlier photographic identification of appellant in his testimony" and, in fact, "refused to make positive identification of appellant on the basis of photographs and relied instead upon his recollection of the events of the

night of the robbery." While the complaining witness testified (Tr. 51-52) that he preferred to see appellant in person before identifying him, there can be no doubt that the "identification" occurred at the time the photographs were shown to him. The issue of identity for all practicable purposes was determined there and then, before the trial. (Cf. United States v. Wade 388 U.S. 218, 229 (1967).)

The Government alleges that the "record discloses some degree of confusion" on the part of the complaining witness "with regard to the circumstances surrounding the showing of the series of photographs from which he initially identified appellant." The Government states that the complaining witness testified "that he could not remember the incident clearly because he had viewed such photographs on a number of occasions in connection with different robberies." The Government alleges further that the "identification procedure was later clarified" by the officer "who testified that he had shown the witness 10 or 12 photographs on the occasion in question, that he had made no particular reference to anyone in the photographs, and that the series had not included pictures of white persons since the suspects were negro."

The fact is that there was no confusion on the part of the complaining witness "with regard to the circumstances surrounding the showing of the series of photographs." This is established by the following testimony (Tr. 51-52):

> Q Did the other individuals in these photographs have similar features? Were they of similar size, similar complexion to this defendant?
>
> A Some of them were white.
>
> Q Some of them were white?
>
> A Yes, some of the photographs I looked at. If I remember correctly -- I don't remember the photographs completely.

If there was any confusion "with regard to the circumstances surrounding the showing of the series of photographs," it came from the officer. This is demonstrated by the testimony of the officer. In an attempt to establish that the identification procedure was clarified by the officer, the Government quoted the following testimony (Tr. 83):

> Q Earlier, Detective Ford, Mr. Joseph testified that among those photographs there were pictures of certain white individuals, members of the white race in those photographs.
>
> Do you recall how many were in there?

A No, I can't say that the white -- photographs of persons of the Caucasian race were in there, sir, no.

Q Is this a common practice to have a mixture of persons when you have a suspect?

A No. That's why I say I wouldn't put those photographs, of a white person, in with photos I was showing a complainant if the suspects in the case were Negro.

A careful analysis of this testimony by the officer will show that what the officer actually stated was not that he had not included photographs of persons of the Caucasian race among the photographs shown to the complaining witness, but that it was not his practice to include photographs of persons of the Caucasian race where the suspect is a negro. This is borne out by the testimony which immediately follows that quoted by the Government in its brief. This testimony is as follows (Tr. 83):

Q But he has testified that he saw photographs --

A I say, I don't recall putting any white photographs -- persons in amongst the suspects.

Thus, while the officer testified that he did not recall placing photographs of persons of the Caucasian race among the photographs, the complaining witness testified that among the photographs shown to him were persons of the Caucasian race. If

there is any confusion involved "with regard to the circumstances surrounding the showing of the series of photographs," it was brought about by the testimony of the officer and not that of the complaining witness.

CONCLUSION

Appellant submits that because of the errors set forth, he was not given a fair trial. The judgment of the lower court therefore should be reversed.

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Certificate of Service

I hereby certify that a copy of the foregoing reply brief was mailed to the U. S. District Attorney, Appeals Division, U. S. Court House, Washington, D. C. - 20001, this 7th day of July, 1969.

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